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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

BRIEF OF RESPONDENT TALLEY INDUSTRIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER L. STRATTON
Two Wall Street
New York, New York 10005
Counsel for Respondent
Talley Industries, Inc.

BRECK P. MCALLISTER
BENJAMIN VINAR
ROGER W. KAPP

DONOVAN LEISURE NEWTON & IRVINE

Of Counsel



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BRIEF OF RESPONDENT TALLEY INDUSTRIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introductory Statement

The instant petition for certiorari is the last of a series of efforts by the lame-duck management of General Time Corporation ("General Time") to maintain itself in office despite the fact that it was voted out of office on April 22, 1968 at the annual meeting of its stockholders. This it now seeks to accomplish in an action which it did not bring, in which no lawfully protected rights or interests of General Time are involved, and in which the Securities and Exchange Commission (the "Commission") which brought this action has rested content with the decision of the Dis-

trict Court, sought no appeal therefrom and has not petitioned this Court for review on certiorari.

The petition fails to make clear that the sole aspect of the judgment below which petitioner seeks reviewed is the nature of the equitable relief that was awarded in favor of the Commission against petitioner's co-defendants, Talley Industries, Inc. ("Industries") and American Investors Fund, Inc. (the "Fund"). Indeed, it is simply not possible to understand the nature of this litigation from the petition.

The suit below was one brought by the Commission as plaintiff against respondents Industries, the Fund and Chestnutt Corporation. In its complaint, the Commission charged these defendants with violation of § 17(d) of the Investment Company Act of 1940 (hereinafter the "Act") and sought broad injunctive relief. Petitioner was only a nominal defendant below. No relief was sought by or against it in the action. Its presence in the case at all was simply to provide a means to permit the court to preserve the status quo pending determination of whether the Commission's request for disfranchisement of Fund's and Industries' General Time stock should be granted.

As the Court of Appeals stated below, petitioner is "endeavoring on this appeal to vault from its position as a nominal defendant to that of a plaintiff and to take over a role which the true plaintiff, the SEC, has abandoned." (Pet. App. A, 14a)*

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* Refers to pages in the Appendix to the petition herein. References to pages in the body of the petition are indicated by "Pet. ——." References to the Appendix in petitioner's previous petition in this case (Docket No. 512) are indicated by "Pet. App. —— in Docket No. 512."

The facts have been carefully detailed by the Court of Appeals below in its first (July 31, 1968) opinion in this case (reported at 399 F.2d 396). A description of the salient facts, however, including those leading to the second opinion (November 19, 1968) of the Court of Appeals below (—— F.2d ——; unofficially reported at CCH Fed. Sec. L. Rep. ¶ 92,303, p. 97,437, and reproduced in Pet. App. A, 1a-15a) is presented *infra* in our Counter Statement of the case.

The Pertinent Statutes

Sections 1(a) and 1(b) of the Act

The Investment Company Act of 1940 (54 Stat. 815, 15 U.S.C. § 80a-1 *et seq.*) is introduced by sections 1(a) and 1(b), which are quoted in Pet. App. D, 25a-28a. Although the petition treats these two sections as though they were one and the same, the two are quite different. Section 1(a) lists those factors which describe Congress' understanding of why "investment companies [were] affected with a national public interest." Section 1(b), on the other hand, enumerates those vices which Congress deemed adversely affected the national public interest and the interest of investors and which were meant to be corrected by the Act.

Thus, while § 1(a) refers to the fact that investment companies "customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce," this condition was not declared adverse and the Act was not designed to regulate it. The Commission has recently reported to Congress:

> "[N]either the Commission nor the Congress of 1940 saw any need to preclude investment companies from acquiring dominant positions—if their managers chose to do so—in the enterprises in which they invest. Accordingly, the Act in general imposes no restrictions on the capacity of investment companies to control the enterprises in which they invest." *Public Policy Implications of Investment Company Growth,* H.R. Rept. No. 2337, 89th Cong., 2d Sess. (1966), p. 307.

Among the conditions, however, which were deemed adverse and were listed as such in § 1(b) of the Act was "(2) when investment companies are organized, operated, managed or their portfolio securities are selected, in the interest of directors, officers, investment advisors, depositors or other affiliated persons thereof . . . rather than in the interest of all classes of such companies' [i.e., the investment companies'] security holders."

Section 17(d)

As one step toward correcting the abuses referred to in § 1(b)(2) above, Congress passed § 17 of the Act. Thus, § 17(a) (with which we are not here concerned) prohibits sales, purchases or loans between an investment company and an affiliate, and subsection (b) provides that the Commission shall grant exemptions from such prohibition on the basis of criteria appearing in that section.

Section 17(d), with which we are concerned in the case at bar, prohibits transactions participated in jointly by an investment company and its affiliate in contravention of such rules and regulations as the Commission might prescribe "for the purposes of limiting or preventing participation by such registered investment company . . . on a basis different from or less advantageous than that of such

other participant." That section, in pertinent part, reads as follows:

> "It shall be unlawful for any affiliated person of . . . a registered investment company . . . acting as principal to effect any transaction in which such registered company . . . is a joint or a joint and several participant with such person . . . in contravention of such rules and regulations as the Commission may prescribe *for the purpose of limiting or preventing participation by such registered . . . company on a basis different from or less advantageous than that of such other participant* . . . ." (Emphasis added.)

The SEC recently gave its administrative interpretation to § 17(d) in a release which it issued in October 1967:

> "Section 17(d) and Rule 17d-1, taken together, are designed to regulate certain situations where persons making the investment decisions for the registered or controlled company may have a conflict of interest and the danger exists that the investment company or its controlled company may be overreached by such affiliated persons. . . ." Investment Company Act of 1940 Release No. 5128 (Oct. 13, 1967), p. 2.

The July 31st opinion below pointed out:

> "The objective of § 17(d) of the Investment Company Act is to prevent affiliated persons from injuring the interests of stockholders of registered investment companies by causing the company to participate 'on a basis different from or less advantageous than that of such other participant.'" Pet. App. A, 4a.

Counter Statement of the Issue Presented

The issue presented is whether or not General Time has standing to appeal from a final decree entered by the District Court and affirmed by the Court of Appeals below in an action brought by the Securities and Exchange Commission against the Fund and Industries for alleged violation by the Fund and Industries of § 17(d) of the Investment Company Act (15 U.S.C. § 80a-17(d)) and SEC Rule 17d-1 thereunder (17 C.F.R. § 270.17d-1), said statute and rule being designed to protect the Fund from participation in a joint transaction with an affiliate, Industries, "on a basis different from or less advantageous than" that of its affiliate, when

(1) General Time, as a portfolio company, that is, a company in which the Fund and Industries have each made an investment, is outside the scope and protective coverage of the provisions of §17(d) of the Investment Company Act of 1940 that were put in issue in the action below brought by the Securities and Exchange Commission and there was no finding below of any injury to any legal interest of General Time on the facts of record;

(2) General Time was only a nominal defendant in said action;

(3) no relief was sought against General Time in said action and no relief is directed against it in said final decree;

(4) plaintiff Securities and Exchange Commission and defendants Fund and Industries have not sought review of the final decree entered by the District Court and affirmed by the Court of Appeals (in fact, plaintiff Securities and Exchange Commission did not even appeal to the Court of Appeals); and

(5) General Time's sole objective is to seek to have included in the remedial portion of the final decree provisions for relief which are inconsistent with the purpose of §17(d) (*i.e.*, protection of the Fund and its shareholders) and which were so found to be by the Court below, petitioner's aim being to prevent Industries and Fund from voting the shares of General Time held by each to oust the management of General Time from office.

Counter Statement of the Case

1. The Facts

Fund is a registered investment company. Industries is an "affiliated person" of the Fund within the meaning of § 2(a)(3)(B) of the Act by virtue of Fund's ownership of over 5% (*i.e.*, about 9%) of Industries' outstanding voting stock, which Fund had purchased in the open market.

On December 29, 1967, Franz G. Talley ("Talley"), President of Industries, telephoned the Fund's offices to speak to Kenneth Haupt, an analyst employed by the Fund whom Talley had met at the time Fund purchased its stock in Industries. By reason of the nature of the call, Haupt referred Talley to George Chestnutt ("Chestnutt"), President of the Fund. Talley's telephone call was prompted by the fact that he believed the Fund had confidence in Talley and in the management of Industries, as evidenced by Fund's having accumulated a large amount of Industries' outstanding stock. Talley told Chestnutt that Industries had purchased stock in General Time, that it intended to buy more and that it had in mind the possibility of a future merger with General Time. Talley asked whether Fund might also wish to buy some General Time stock.

After consulting with his counsel, Chestnutt reported back to Talley that the Fund would examine the situation, but that if the Fund did buy stock in General Time it would maintain its independence and would make no agreement with Industries as to voting, disposition of the stock or whatever. Several days later, after further consideration of the matter, Chestnutt determined that Fund should take a position in General Time. He was motivated both by his study of the company's earnings and of its chart performance and by a belief that if Industries sought a merger the stock would rise as a result of that offer or of others it might stimulate. Fund subsequently did buy 210,000 shares at an average price of $28.49 per share. Industries' 257,937 shares, most of which were acquired after Fund had completed its purchases, were acquired at an average cost to Industries of $36.76 per share.

On February 19, 1968, Talley met with members of the management of General Time and expressed Industries' desire to negotiate a merger with General Time. General Time's management considered the matter but decided to fight any such proposal and so informed Talley. On February 25, 1968, General Time sued Industries and Fund in the Southern District of New York charging, *inter alia*, that they had violated § 17(d) of the Act. Management sought injunctive relief which would disfranchise Fund and Talley.*

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* The District Court dismissed General Time's complaint on April 17, 1968 on the basis of General Time's lack of standing to assert such a cause of action. 283 F. Supp. 400. On appeal, that decision was affirmed. —— F.2d —— (2d Cir., October 23, 1968, Docket No. 32300), unofficially reported in CCH Fed. Sec. L.

On February 29 Industries demanded a copy of General Time's list of stockholders, which was not, however, forthcoming until litigation, brought and won by Industries in Delaware, eventually forced the list from General Time several weeks later.*

During March, Industries organized and sponsored an Independent Stockholders Committee of General Time Corporation (the "Committee"). The Committee made preparations to solicit proxies for the election of its nominees for director of General Time in opposition to the management's slate at the annual meeting of stockholders scheduled to be held on April 22, 1968.

On March 25, following an investigation by the Commission (pursuant to its statutory authority under § 42(a) of the Act) into General Time's charges that Industries and the Fund had violated § 17(d) of the Act, the Commission notified Industries that the Committee's proxy solicitation material would not be cleared unless Industries filed an application with the Commission under Rule 17d-1 for approval of what the staff considered a joint transaction falling within § 17(d) of the Act. Under that compulsion, Industries did file such an application, seeking a declaration of non-applicability of § 17(d) or, in the alternative, retroactive approval, and Fund joined in the application. Reference to the application was made in the

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Rep. ¶ 92,291, p. 97,389. General Time has announced that it does not intend to seek certiorari with respect to that § 17(d) case, which it brought as plaintiff (see Pet. 20 n.).

* After time-consuming attempts to conduct oral examination on issues which the Chancery Court (and subsequently the Supreme Court) of Delaware ruled were irrelevant, General Time defaulted. An order was entered against it and management was forced to deliver a stockholder list to Industries.

Committee's proxy statement and the statement was thereupon cleared by the Commission. Fund in no way participated in the proxy contest, either before or after the Committee's proxy statement was cleared.

Neither Fund nor Industries had known or believed that their actions could be construed as a "joint transaction" requiring prior SEC approval. As they viewed the situation, there had been no promises, agreements or arrangements of any kind, as Chestnutt emphasized there would not be when he told Talley at the outset that the Fund would reserve full independence as to how it might vote its General Time stock and as to when and whether it might dispose of it.

The Commission set Industries' application down for hearings to commence on April 16, 1968. In the interim, the management of General Time negotiated a prospective "bail-out merger" * with a juke box and vending machine company from Illinois (The Seeburg Corporation). Chestnutt found the terms of that proposal "so shockingly unattractive that I couldn't believe that the newspaper report [of April 15, 1968] could be accurate." On Thursday, April 18th, the Fund announced that it intended to vote its stock against the management and in favor of the Committee's slate and the Fund so informed the Commission on the record in the administrative proceedings.

The hearings, which had begun on April 16th, ended on April 18th. The following day the Commission heard oral argument and thereupon filed its Memorandum Opin-

* The plan to merge General Time and Seeburg was announced as being contingent upon the continuation of General Time's then present management.

ion and Order Denying Application* reciting the pertinent facts and concluding that "Under these circumstances we think it clear that Industries and AIF [the Fund] entered into and carried out a joint arrangement within the meaning of Section 17(d) and Rule 17d-1 to acquire GTC [General Time] stock by concerted action." The Commission's Memorandum Opinion and Order Denying Application made no reference to Fund's intention of voting its holdings for the candidates supported by Industries but noted its "continuing jurisdiction under Section 17(d) and Rule 17d-1 over any future transfers by Industries of the GTC stock it has acquired in violation of these provisions."

On April 5, 1968, General Time had filed the second of its lawsuits against Industries, the Fund and others, this one charging that the Committee's proxy solicitation was false and misleading. General Time again sought an order disfranchising Industries and the Fund. General Time applied twice for preliminary injunctive relief but was twice denied such relief on the facts. The second application was made on the morning of April 22nd, the day of the stockholders' meeting, but when that application was denied** the stockholders' meeting proceeded.

At the stockholders' meeting the ballots were cast (including those of Industries and of the Fund for the Com-

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* Reproduced in Pet. App. D, 46a-50a, in Docket No. 512, Oct. Term 1968.

** On appeal by General Time, these two rulings of the District Court were affirmed, —— F.2d —— (2d Cir. Docket 32299, October 23, 1968), unofficially reported at CCH Fed. Sec. L. Rep. ¶ 92,291, p. 97,389. General Time's petition for certiorari to review that affirmance bears October Term 1968 Docket No. 716 in this Court.

mittee's slate), and the meeting was adjourned to May 3rd to permit the inspectors of election to count the votes and prepare their report. By reason of the litigation which ensued, however, the stockholders' meeting was repeatedly recessed, at first by stipulation and subsequently by court order, until it was permitted to be completed on December 2, 1968. On that date, the inspectors of election reported that the Committee's candidates had received 979,235 votes against 882,159 votes for the incumbent directors, a margin in favor of the Committee's candidates of 97,076 votes. By reason of the Court of Appeals' order of November 19, 1968 (see Pet. App. C, 23a-24a), the newly elected directors of General Time (*i.e.*, the Committee's candidates) are stayed from taking office pending final determinations by this Court in Docket Nos. 512, 716 and 821.

2. *The Proceedings Below*

On May 1, 1968, while the stockholders' meeting was in recess to permit the count of ballots, the Commission brought the instant litigation seeking an order which would, *inter alia*, require Industries and Fund to withdraw the votes each had cast on April 22nd in favor of the Committee's slate, and which would permanently enjoin Industries and the Fund from voting their shares in the future for any directors whose names had been or might be proposed by Industries or for any merger or consolidation of General Time and Industries.*

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* The petitioner's characterization to the contrary notwithstanding, the Commission did not bring suit "to protect its primary jurisdiction under the Act" (see Pet. 3) by "compel[ling] respondents to seek Commission approval" of their voting, past or future (see Pet. 5). The complaint sought a permanent injunction against any such voting. See Pet. App. A, 9a-10a, in Docket No. 512.

After an expedited trial, the District Court dismissed the Commission's complaint on the basis that § 17(d) had not been violated. 286 F.Supp. 50 (S.D.N.Y. 1968), reproduced as Pet. App. B, 19a-38a, in Docket No. 512. The Commission appealed and the Court of Appeals reversed (399 F.2d 396), holding that whatever might be the Court's own views as to whether the facts showed a "joint transaction," the Commission's findings, having been supported by "substantial evidence," were binding. As to relief, however, the Court of Appeals noted that the Commission had not purported to make any order concerning remedy. The Court ruled that the case was a suit in equity and not an action to enforce an administrative order, and that it was therefore the responsibility of the courts to "'do equity and mould [the] decree to the necessities of the particular case.' *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944)." (Pet. App. A, 17a, in Docket No. 512) Finding that the violation had not been deliberate, that disfranchisement was basically punitive and that (as it then appeared to the court) an order such as was sought by the Commission would hurt the Fund and its shareholders rather than effect the Congressional purpose of protecting them, the Court of Appeals remanded to the District Court with instructions to that Court to formulate an appropriate decree.*

On remand, contrary to Petitioner's assertions that the District Court refused to permit an evidentiary hearing

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* Apparently anticipating that the Commission would be unable to marshal further evidence or argument in the District Court that disfranchisement was appropriate to the statutory purpose, General Time petitioned this Court for review of the July 31, 1968 decision of the Court of Appeals (see Docket No. 512) and sought, unsuccessfully, in that Court and before Mr. Justice Harlan, to stay proceedings in the District Court pending such review.

(Pet. 7), the District Court invited the Commission to introduce whatever evidence bearing on relief it chose to offer. The Commission, however, did not choose to offer any further evidence at all. The court announced that it did not intend to hear any evidence from the nominal defendant, General Time, whose interests were different from (in fact, obviously antagonistic to) those of the Fund's shareholders. However, General Time asked for, and was granted, time until the following day to prepare and submit an offer of proof. The offer, when made, was not so much an offer of proof as an offer to conduct cross-examination of adverse witnesses to ascertain whether there might in fact be any evidence from which argument might be made.*

The Commission persisted in the District Court in its earlier argument that the final decree ought to contain provisions forcing Industries and Fund to withdraw the votes each had cast at the 1968 meeting of stockholders of General Time. (Such an order would have meant, of course, a victory by default for management.) The Commission again urged that the wrongdoers should be deprived of the "fruits of their wrong" so as to "deter similar future violations" by others. The Commission argued that if such relief damaged those whom the Act was meant to protect, *i.e.*, the stockholders of the Fund, they might seek redress against the individuals responsible.

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* Petitioner asserts that in this endeavor its position was supported by the Commission (Pet. 7). This statement is not really true. Counsel for the Commission did suggest that the court receive evidence from General Time, regardless of General Time's status, "if General Time does have evidence that is relevant and material to the shape of the decree and that might be helpful to your Honor in that connection. . . ." The court persisted, however, in its ruling that while it would take any evidence that the

Having in mind the July 31st decision of the Court of Appeals, and on his own consideration of the matter, District Judge Wyatt ruled that "to the extent that I am permitted to make an independent finding and determination, I have made that finding and determination that no such injunctive relief is appropriate." (See Pet. App. A, 8a.) Judge Wyatt thereupon declined to include in the decree any provision that the April 22nd votes of Industries and the Fund be withdrawn.

In its July 31st opinion the Court of Appeals noted the nature of one aspect of equitable relief it believed might be appropriate, *i.e.*, "a prohibition against sale of its shares by Industries without according Fund a fair opportunity to participate." (Pet. App. A, 17a, in Docket No. 512) The final decree formulated by the District Court did impose extensive restrictions on any disposition by Industries of its General Time stock, giving the Fund equal or preferential treatment with respect to any sale.

The management of General Time was, of course, disappointed that it was unable to pluck victory in the election out of the ashes of the Commission's litigation despite the fact that the stockholders of the Company had voted them out of office. Management, therefore, caused an appeal from the final decree to be filed in the name of General Time Corporation with the Court of Appeals.

The Securities and Exchange Commission did not appeal.*

Commission wanted to present, it would not accept evidence from General Time. The Commission chose to offer no evidence.

* The Court of Appeals invited the Commission to submit a brief as *amicus curiae* and the Commission did so. The Commission's brief, however, expressed no opinion on the central question of

On November 19, 1968, the Court of Appeals affirmed the final judgment entered by the District Court. In its opinion (Pet. App. A) the Court of Appeals noted that this was not an action for the enforcement of a Commission order providing for specific relief. It was a suit in equity, subject to judicial concepts of equity. The court found that the defendants' violation of § 17(d) had not been willful and held that punitive relief was not warranted. The Court of Appeals ruled that the relief decreed by the District Court accomplished the purpose of § 17(d) of protecting the Fund and its shareholders. In any event, the court held, General Time—a purely nominal party defendant—had no standing to assert a claim under § 17(d) or to appeal in the case at bar from the relief awarded in favor of plaintiff, the Commission, against defendants Fund and Industries.

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whether or not General Time had standing to appeal. In its brief, the Commission admitted that it took "no particular exception" to the substantive provisions of the final decree.

ARGUMENT

I.

Petitioner Has No Standing to Appeal Where the Judgment Sought to Be Appealed Was Not Adverse to It.

The instant action was brought, not by General Time, but by the Securities and Exchange Commission in performance of its role of overseeing enforcement of the Investment Company Act under § 42(e) thereof, 15 U.S.C. § 41(e). The Commission elected not to appeal from the final judgment of the District Court, and has not sought review here of the judgment of the Court of Appeals.

General Time was before the courts below as a nominal party defendant. No judgment was entered against it.* Nonetheless, General Time now purports to seek review, claiming that the courts below did not go far enough with respect to the relief granted against its co-defendants.

The law is clear that not every party to a judgment is entitled to appeal from it, but "only one injured by the judgment sought to be reviewed can appeal . . . ." *Parr* v. *United States,* 351 U.S. 513, 516 (1956). *Accord, Fuqua* v. *Bidwell,* 281 F.2d 753, 754 (6th Cir. 1960). Since the judgment below was not in any way adverse to General Time, petitioner has no standing to seek review of it. *Ibid.*

> "It is settled law that even a party cannot appeal from a decision which is not adverse to him. [Citations

* The District Court did direct that the stockholders' meeting reconvene and that the further business thereof (which had been stayed during the litigation) be completed. General Time has not objected to those provisions of the final decree. On December 2, 1968, the meeting was reconvened and its business was completed.

> omitted.] The decree of the district court was not directed at the intervening defendants. Where an injunction is granted, one cannot generally appeal from the order unless he is directly or indirectly restrained from the performance of some act." *Milgram* v. *Loew's, Inc.*, 192 F.2d 579, 586 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

See also *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 325-26 (1945). General Time, having been in no way prejudiced by the injunctive decree entered against its co-defendants, simply had no standing to appeal from that final decree and has no standing to seek review in this Court.

II.

Petitioner Lacks Standing and the Determination Below to That Effect Does Not Conflict With Any Principles Enunciated by This or Any Other Court.

The general rule is well established by decisions of this Court and Federal courts of appeals that in order to have standing to maintain an action a party must be a member of the class intended to be protected by the statute and must have suffered the kind of injury against which the statute was designed to protect. *Stark* v. *Wickard*, 321 U.S. 288, 304 (1944); *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632, 634 (1944); *L. Singer & Sons* v. *Union Pac. R.R.*, 311 U.S. 295, 301, 304 (1940); *Sprunt & Son* v. *United States*, 281 U.S. 249, 255 (1930); *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148-49 (1923); *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783, 790, 793-94 (8th Cir. 1967); *Pennsylvania R.R.* v. *Dillon*, 335 F.2d 292, 294-95 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964). *Chi-*

cago v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), is not to the contrary, see *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 6-7 (1968). His injury, moreover, "must be immediate and pecuniary and not a remote consequence of the judgment," *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 Fed. 494, 499 (9th Cir.), *cert. denied*, 239 U.S. 641 (1915). *Accord, In re Michigan-Ohio Bldg. Corp.*, 117 F.2d 191, 193 (7th Cir. 1941); *Mayer* v. *National Missile & Electronics, Inc.*, 326 F.2d 401, 402 (9th Cir. 1964). See *Webb* v. *Beverly Hills Fed. Sav. & Loan Ass'n*, 364 F.2d 146, 149 (9th Cir. 1966). And "a merely nominal party to an action cannot appeal." *Hamilton Trust Co.* v. *Cornucopia Mines Co., supra. Accord, Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 383 (1933).

Petitioner cites this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Flast* v. *Cohen*, 392 U.S. 83 (1968), as well as the Fifth Circuit's decision in *Puente de Reynosa, S.A.* v. *City of McAllen*, 357 F.2d 43 (5th Cir. 1966), for the proposition that traditional principles of standing are no longer to be applied by courts and that all that is now required is evidence of a sufficiently strong interest on the part of the plaintiff in the outcome of the case so that the courts may rest assured that the issues will be well framed by the litigants. Those cases involved the problem of defining principles of standing to assert the public interest against alleged violations by a governmental body of a Constitutional or statutory prohibition. There is a clear-cut distinction between the problems of standing raised by such "public actions" and the concern for standing in the case of private claims, see, *e.g.*, Jaffe, Judicial Control of Administrative Action 475 *et seq.*, 501 *et seq.* (1965); and as this Court noted in *Flast* v. *Cohen, supra*, 392 U.S. at

101-02, there are "various rules of standing applied by federal courts [which] have not been developed in the abstract" but rather "have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated."

In most "public actions," as in *Flast* v. *Cohen,* there is no one person or class of persons which can be singled out as the proper person or class of persons entitled to sue. The problem in these actions is not so much one of standing as it is one of other aspects of justiciability—*i.e.,* either a suit can be maintained by any citizen to vindicate the public right or it can be asserted by none. See generally *Flast* v. *Cohen,* 392 U.S. at 98-101 and n.17. As this Court went on to point out in *Flast,* even in a public action, where there is a particular class of persons most clearly affected, then "the federal standing doctrine would require that standing be limited to . . . the affected class." 392 U.S. at 105 n.25.

In the instant case, unlike the situation in *Flast* v. *Cohen* and similar cases, we are concerned only with standing to assert private rights, and the test is whether the party, here a nominal party, is within the class that the statute was designed to protect and suffered the kind of injury that the statute was designed to protect against. The authorities that support this statement are cited above.

The Investment Company Act has been held to create private rights of action which are enforceable at the suit of a person intended to be protected by the Act. *Brown* v. *Bullock,* 194 F.Supp. 207, 228 (S.D.N.Y.), *aff'd,* 294 F.2d 415 (2d Cir. 1961); *Taussig* v. *Wellington Fund, Inc.,* 313

F.2d 472, 476 (3d Cir.), *cert. denied,* 374 U.S. 806 (1963); and the general principles of standing have, of course, been held applicable in suits brought thereunder. In *Taussig, supra,* the court inferred a private right of action on the part of the stockholder of an investment company against the management company under § 35 of the Investment Company Act, and noted that "a breach of statutory duty which causes injury to one of the class that the statute serves to protect affords by implication a sufficient basis for a private civil suit by the injured party." Conversely, where plaintiffs are not persons within the class intended to be protected, they do not have standing to assert a claim under the Act. *Greater Iowa Corp.* v. *McLendon,* 378 F.2d 783, 790, 793-94 (8th Cir. 1967).

In *Greater Iowa,* plaintiffs were the issuer corporation and its directors and the defendants were an insurgent group of stockholders who had formed a voting trust. Plaintiffs alleged that defendants' trust was in reality an unregistered investment company in violation of the Investment Company Act, and plaintiffs sued to enjoin the defendants from proceeding, through the instrumentality of that trust, with steps designed to permit defendants to secure control. The court held that plaintiffs lacked standing to bring such an action "because they are not within the class that the statute was designed to protect." 378 F.2d at 793. The court ruled that:

> "Plaintiffs are merely fellow shareholders and the issuer of securities held by this alleged investment company. We see no basis under this Act that the issuer company can oversee the trading of its securities or object to the method in which its shares are acquired or the persons who acquire them." *Id.* at 794.

Similarly, in the case at bar, General Time, as merely the "issuer company," has no standing to oversee joint transactions alleged to violate an Investment Company Act provision intended to guarantee equal treatment to one of its stockholders (*i.e.*, the Fund) in a joint transaction participated in by another of its stockholders (*i.e.*, Industries). General Time simply is not a member of the class—the Fund or the Fund's shareholders—which § 17(d) was designed to protect.

Petitioner's attempts below to espouse the cause of the Fund and the Fund's shareholders (see its offer of proof below) was a sham. Petitioner cannot be heard to assert the rights of a class to which not only does it not belong, but to whose interests it is plainly antagonistic. See *Hansberry* v. *Lee*, 311 U.S. 32, 44 (1940); *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968).

III.

The Relief Which Petitioner Demands Against Its Co-Defendants Would Contravene the Basic Purpose of the Investment Company Act.

Congress was explicit as to the purpose of § 17(d) in the language of the statute itself. Thus, joint transactions are proscribed if they contravene rules and regulations to be prescribed by the Commission "for the purpose of limiting or preventing participation by [a registered investment company] on a basis different from or less advantageous than that of" its affiliate. The statute was designed to protect investment companies and their stockholders from being taken advantage of by affiliates. Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., 1940, p. 1116; H.R. Rept. No. 2639, 76th Cong., 3d Sess., 1940, p. 9. *Investment Trusts and Investment Companies,* Rept. of the SEC, Part Three, "Abuses and Deficiencies in the Organization and Operation of Investment Trusts and Investment Companies" 22 (1939). And see Section 1(b)(2) of the Act, 15 U.S.C. § 80a-1(b)(2). In a recent release the Commission gave its administrative interpretation:

> "Section 17(d) and Rule 17d-1, taken together are designed to regulate certain situations where persons making the investment decisions for the registered and controlled company may have a conflict of interest and *the danger* exists that the *investment company or its controlled company* may be overreached by such affiliated persons. . . ." Investment Company Act of 1940 Release No. 5128 (Oct. 13, 1967), p. 2. (Emphasis added.)

But the relief petitioner seeks is wholly inconsistent with the interests of the Fund and its shareholders. Petitioner would ask this Court to ignore the language of § 17(d) and misapply the statute against the explicit purpose for which it was enacted, all for the benefit of petitioner's management. But "to construe statutes so as to avoid results glaringly absurd, has long been a judicial function." *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

In *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941), this Court refused to interpret the Securities Act of 1933 to bar the corporate issuer of unregistered stock from recovering the proceeds of the issue from the underwriter. Forfeiture of the issuing company's capital to a third party (the underwriter) would only have injured the very persons (the purchasers who had become stockholders of the issuer) whom the violated statutory provision was designed to protect.

> "Although the challenged contract bears no evidence of criminality and is fair upon its face, we are asked to apply a sanction beyond that specified by declaring it null and void because of relationship to a public offering. The basis for this demand is a supposed federal public policy which requires such annulment in order to secure observance, effectuate the legislative purpose and prevent noxious consequences. 312 U.S. at 42-43.
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> ". . . . [T]o accept the conclusion . . . would probably seriously hinder rather than aid the real purpose of the statute. *Id.* at 43.
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> ". . . . And it would be anomalous to rest such an injury to the investors upon the fact that the transaction

in which the securities were distributed violated the Act, which was designed to protect those investors." *Id.* at 44 n.

General Time's petition for certiorari passes over the fact that the subject of this dispute is a final judgment which determined the appropriate equitable relief to be awarded on the fact findings below in an action for equitable relief brought by the Commission under § 42(e) of the Act, 15 U. S. C. § 80a-41(e). It was not error for the court below not to grant all of the injunctive relief sought by the Commission. No order of the Commission decreed such relief.* (See Pet. App. A, 8a.) By invoking equity, the Commission submitted itself to judicial concepts of equity. The court below found that the violation was the result of innocent mistake, that Fund and its shareholders had not been injured in any way, and that the defendants' conduct did not therefore justify drastic punitive relief. This Court has consistently held that purely punitive relief, such as that rejected below, is outside the province of equity and ought not be allowed in a court of equity. See, *e.g.*, *United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409 (1945); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944).** Furthermore, disfranchisement,

* Thus, as the court below noted, such cases as *SEC* v. *New England Elec. System*, 390 U.S. 207 (1968), are inapposite.

** Indeed, the SEC has gone on record previously to reject as improper the form of relief which it sought in this case. See *Pacific Ins. Co.* v. *Blot*, 267 F.Supp. 956, 958 (S.D.N.Y. 1967), where "the Court notes its concurrence with the Commission's view that permitting the [issuer] corporation to disable a purchaser from exercising his rights as a shareholder under state law—even if his purchase violated Rule 10b-5—'seems unnecessarily drastic and potentially unsettling for the securities markets and corporate af-

the court found, would be inconsistent with the purpose of protecting the Fund and its shareholders. These determinations were entirely within the discretion of the court. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 326-29 (1944).

No case has ever held or suggested that a court of equity must grant injunctive relief—particularly the kind of drastic relief sought here—where in the opinion of the court it would be unjust and improper. On the contrary, the general rule, as stated by this Court in *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944), and quoted by the court below (Pet. App. A, 8a-9a), is that "The essence of equity jursdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." 321 U.S. at 329.

The foregoing principles are beyond dispute, and certainly there is no need for certiorari in the instant case.

CONCLUSION

The delay that has already resulted from this litigation has doubtless harmed all of the real parties in interest herein. At this writing, two-thirds of the term to which the Committee's candidates for director of General Time Corporation have been elected has expired. Whatever other purpose Section 17(d) of the Investment Company Act of 1940 may have been designed to serve, it was not designed to perpetuate in office a management which has been rejected by those who own the stock of the corporation.

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fairs.' (Memorandum of the Commission, p. 9)." *Accord, Allied Artists Pictures Corp.* v. *D. Kaltman & Co.,* 283 F.Supp. 763, 765 (S.D.N.Y. 1967).

For that reason, and the reasons stated above, we pray that the instant petition for certiorari be promptly denied.

Respectfully submitted,

WALTER L. STRATTON,
Two Wall Street
New York, New York 10005,
Counsel for Respondent
Talley Industries, Inc.

BRECK P. MCALLISTER,
BENJAMIN VINAR,
ROGER W. KAPP,
DONOVAN LEISURE NEWTON & IRVINE,
Two Wall Street
New York, New York
Of Counsel.